M. JOHN KENNEDY

IBLA 87-2 Decided June 21, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, upholding in part violations specified in Notice of Incident of Noncompliance W-148158 (WY-86-15).

Affirmed.

1. Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Incidents of Noncompliance--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties

   The procedural protection afforded by sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982 (43 U.S.C. | 1719 (1982)) does not apply to assess-
   ments levied under the oil and gas lease operating regulations.

2. Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Incidents of Noncompliance

   In addition to any loss or damage to Federal resources and improvements which may result from a violation of the operating regulations, BLM incurs costs and expenses which would not have been incurred but for the noncompliance. If the issuance of an INC is technically and procedurally correct and the operator fails to abate the violation within the specified time, it is proper to impose an assessment to cover loss or damage to the lessor from the noncompliance, including administrative and other costs to the United States.

APPEARANCES: Haultain E. Corbett, Esq., Sheridan, Wyoming, for appellant; Lowell D. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

M. John Kennedy has appealed part of a Wyoming State Office, Bureau of Land Management (BLM), decision dated August 20, 1986. The decision was issued following a Technical and Procedural Review of Notices of Incidents

of Noncompliance (INC's) issued July 14 and 25, 1986. The Wyoming State Office upheld as properly issued two INC's, and found the associated assessments to be appropriate.

Inspector Rafael Navarrette of the Buffalo Resource Area Office, BLM, inspected the site of oil and gas lease W-148158 on July 8, 1986. On July 14, 1986, he issued INC's RN-061-86-450, and RN-061-86-452 through RN-061-86-455 citing appellant for five separate violations. Three of the five violations were classified as moderate, and two were deemed to be minor.

Following service of the INC's on appellant, Inspector Navarrette reinspected the site July 22, 1986. Based on his findings, Navarrette issued INC RN-061-86-459 on July 25, 1986, citing appellant for failure
to comply with written orders contained in the prior INC's within the specified time. Cover letters and Bills for Collection totaling $1,000 accompanied the INC sent to appellant. The assessments were levied pursuant to 43 CFR 3163.3(a) (1986) for failure to comply with the prior orders to abate those violations classified as moderate. Appellant acknowledged receipt by a letter dated July 29, 1986, and informed BLM that the assessments would be appealed. The request for Technical and Procedural Review was subsequently filed and the decision from which the present appeal is taken followed.

In INC RN-061-86-450, the inspector cited appellant for ineffectively sealing one storage tank and failure to seal a second. After its technical and procedural review, BLM determined that the INC for failure to seal the second tank should be withdrawn due to lack of BLM procedures for addressing the problem found by the inspector. The INC issued for the first tank was upheld.

BLM also upheld INC RN-061-86-452, issued after the inspector found oil on top of the water in a disposal pit in violation of NTL-2B. The State Office rescinded INC RN-061-86-453, which was issued for failure to have a disposal pipe reach the surface of the disposal pond, because BLM determined that the problem found by the inspector was not clearly addressed by the regulations and the inspector should have issued written orders rather than an INC. 1/

On appeal, appellant does not challenge either the factual basis for the remaining INC's or the correctness of BLM's decision upholding their issuance. On review of the record, we find no apparent error in either the issuance of the INC's or the decision upholding their issuance and the associated assessments. Accordingly, we need not further consider these matters.

1/ Although it was not stated in the decision, it appears that by rescinding certain of the INC's BLM also reduced the assessment to $500.

Appellant argues that if the payments imposed are civil penalties under 43 U.S.C. | 1719 (1982), he was denied the procedural protection provided by the statute. He further argues that if they are assessments under 43 CFR 3163.3 (1986), rather than civil penalties, the Secretary is without authority to enforce such assessments. More particularly, appellant argues: (1) the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), P.L. 97-451, 96 Stat. 2447 (1983) (codified at 30 U.S.C. || 1701-1757 and amending 30 U.S.C. || 188, 191 (1982)), does not grant BLM authority to impose assessments; (2) there has been no final determination as to appellant's failure to comply and "no opportunity for a hearing on the record"; (3) there has been no final determination that a loss or damage has occurred; and (4) no agreement between the parties provides for the payment of liquidated damages (Statement of Reasons at 5-6).

A proper response to appellant's arguments requires a brief review of the recent history of the relevant regulations now found at 43 CFR Part 3160. In 1981 the Geological Survey issued a notice of intent to propose rulemaking to revise and modernize the regulations governing operations on onshore oil and gas leases. 46 FR 27968 (May 22, 1981). After receiving comments, proposed rules were published. 46 FR 56564 (Nov. 17, 1981). Final rules were subsequently issued by the Minerals Management Service (MMS) to whom these responsibilities had been transferred. 47 FR 47758 (Oct. 27, 1982). As proposed and adopted, the provision for "Assessments for noncompliance" provided:

> Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual loses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damages to the lessor from specific instances of noncompliance. * * *
>
> (a) For failure to comply with a written order or instructions of the Supervisor * * *, $250 if compliance is not obtained within the time specified.

Id. at 4772. An additional regulation provided for imposition of penalties. Id.

Responsibility for supervising onshore oil and gas lease operations was subsequently reassigned to BLM, which issued rulemaking redesignating and modifying the regulations. 48 FR 36582 (Aug. 12, 1983). The provision quoted above was redesignated as 43 CFR 3163.3 and amended by naming the "authorized officer" as the official issuing written orders and instructions. Id. at 36583, 36586. A similar change was made in the penalty regulation. Id. at 36586.

In 1983 Congress enacted FOGRMA and BLM proposed and adopted revisions to the regulations to implement those portions of the Act applying to onshore field operations. 48 FR 41738 (Sept. 16, 1983), 49 FR 37356 (Sept. 21, 1984). The only change made to 43 CFR 3163.3 was to subsection (e). Significant changes were made to the penalties provision (43 CFR

3163.4-1) to distinguish penalties imposed under authority of the Mineral Leasing Act from those imposed under FOGRMA. See 49 FR 37365 (Sept. 21, 1984).

In 1985 BLM announced its intent to propose rulemaking to more clearly define the operational requirements established by FOGRMA and its intent to suspend the imposition of assessments under most of the subsections of 43 CFR 3163.3. 50 FR 11517 (Mar. 22, 1985). However, the levy of assessments for failure to comply with written orders under 43 CFR 3163.3(a) was not to be suspended. Id. The suspension was put into effect by Instruction Memorandum (I.M.) No. 85-394 (Apr. 16, 1985). See also I.M. No. 84-594, Change 4 (Apr. 16, 1985).

[1] Several conclusions can be drawn from the history of the regulations. First, the applicable regulation at the time INC's were issued had been in effect since 1982. Second, the regulation was in effect prior to the enactment of FOGRMA and, clearly, assessments made under 43 CFR 3163.3(a) (1986) are not civil penalties imposed pursuant to section 109
of FOGRMA (43 U.S.C. | 1719 (1982)). Consequently, the procedural protection afforded by FOGRMA does not apply to assessments imposed under 43 CFR 3163.3(a) (1986). Rather, the applicable procedure is to request (as appellant did) technical and procedural review. 43 CFR 3165.3 (1986); see Bowers Oil & Gas Exploration Inc., 89 IBLA 316, 317-18 (1985).

A party requesting technical and procedural review submits a written request for review, stating the errors he believes were made and supporting documentation. The record is then reviewed by an official who issues a final decision, reviewable on appeal to this Board. See 43 CFR 3165.3(b) (1986). Appellant complains of not receiving a hearing, but has not cited any authority indicating that he was entitled to one. See 5 U.S.C. | 554 (1982); cf. 43 CFR 3165.3(c).

[2] As the wording of the regulation indicates, and as argued by appellant in quoting from the preface to the 1984 changes to the regulations, assessments are not penalties but are a form of liquidated damages. An early version of the assessment regulation acknowledged this fact in its title (7 FR 4138 (June 2, 1942)), and BLM reiterated the point when further revising the regulations in 1987. 52 FR 5384, 5387 (Feb. 20, 1987); see 51 FR 3882, 3884-85 (Jan. 2, 1986) (proposed rules). The Board has frequently deemed assessments to be liquidated damages. See, e.g., Lyco Energy Corp., 92 IBLA 81 (1986); Mont Rouge, Inc., 90 IBLA 3 (1985).

Appellant's argument that assessments cannot be imposed because there has been no final determination that the Government has suffered a loss or damage overlooks the reason for assessments. In addition to whatever loss or damage to Federal resources and improvements may occur due to a violation of the operating regulations, "[c]osts and expenses are incurred by BLM which would not have been incurred but for the noncompliance. BLM must issue the notice, and take such steps and conduct such additional physical inspections as are necessary to ensure the noncompliance is abated." Lyco Energy Corp., supra at 85; see Benson-Montin-Greer Drilling Corp., 92 IBLA 92, 95-96 (1986); 49 FR 37361 (Sept. 21, 1984); 7 FR 4138 (June 2, 1942).

If the issuance of an INC is technically and procedurally correct and the operator fails to abate the violation, it is proper to impose an assessment to cover loss or damage to the lessor from the noncompliance, including administrative and other costs incurred by the United States. Timberline Production Co., 98 IBLA 188, 191 (1987); William Perlman, 96 IBLA 181, 186 (1987); see 52 FR 5384, 5387 (Feb. 20, 1987); 49 FR 37356, 37361 (Sept. 21, 1984).

Finally, appellant asserts that the lease document does not provide for assessment and payment of liquidated damages. While it may be correct that appellant's lease does not expressly mention liquidated damages, Federal oil and gas leases provide that the lessee is bound by applicable Departmental regulations. This includes the regulations governing operations. See generally 52 FR 5384, 5386-88 (Feb. 20, 1987); 51 FR 3882, 3884-85 (Jan. 30, 1986).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge